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No. 83-1873

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

PACEMAKER DIAGNOSTIC CLINIC OF AMERICA, INC., a corporation,
Petitioner

v.

INSTROMEDIX, INC., a corporation
and THE UNITED STATES,
Respondents.

BRIEF OF RESPONDENT INSTROMEDIX IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Is 28 U.S.C. §636(c), which provides that with the voluntary consent of the parties magistrates may conduct trials and enter final judgments, unconstitutional?

PARTIES

All of the parties of this proceeding are named in the caption. Instromedix, Inc. does not have a subsidiary and is not owned by a parent company.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases: **Page**

Cases: **Page**

Constitution, Statutes and Rules

U.S. Constitution

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Respondent, Instromedix, Inc. prays that a writ of certiorari not issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit (en banc) entered February 16, 1984. A question of federal law has

not been presented which need be settled by this Court. Nor has a federal question been decided in a way which conflicts with a decision of this Court.

REPORT OF OPINIONS

Respondent adopts the report of opinions as filed by Petitioner.

JURISDICTION

Respondent adopts Petitioner's statement of jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent adopts Petitioner's statement of constitutional and statutory provisions.

STATEMENT OF THE CASE

Respondent adopts Petitioner's statement of the case.

REASONS FOR DENYING THE WRIT

1. The Question Of Federal Law Presented In This Case Need Not

Be Decided By This Court.

The original three judge panel's sua sponte raising of the constitutional issue and decision were misconceived[1]. When a court has subject matter jurisdiction, and when the parties have agreed that trial may be had before and judgment entered by some one other than an Article III judge, the judgment entered by that person is valid and proper[2]. On rehearing, an eleven judge en banc panel of the Ninth Circuit, three judges dissenting, reversed the original panel's decision of unconstitutionality of the Magistrates Act of 1979[3]. The en banc decision is in accord with the decisions of all other federal

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1 712 F.2d 1305.

2 Heckers v. Fowler, 69 U.S. (2 Wall.) 123, 133 (1864).

3 725 F.2d 537.

circuits which to date have passed on the constitutionality of the Magistrates Act of 1979 and specifically 28 U.S.C. 636(c)[4]. There is no conflict between any of the circuits with respect to the constitutionality of 28 U.S.C. 636(c). Until such time as a conflict should develop between the circuits on this question, there is no need for this Court to pass on the question.

Further, on April 28, 1983, this Court amended the Federal Rules of Civil Procedure to authorize magistrates to exercise the authority Congress provided in 28 U.S.C. 636(c), i.e., Fed. R. Civ. Pro. 73(a). That event occurred less than one year after the Court decided Northern

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[4] Warton-Thomas v. U.S., 721 F.2d 922 (3rd Cir. 1983); Collins v. Foreman, 729 F.2d 108 (2d Cir. 1984); Goldstein v. Kelleher, 728 F.2d 32 (1st Cir. 1984).

Pipeline[5] on which Petitioner and the dissenting Ninth Circuit judges principally rely. The promulgation of that rule indicates that this Court did not believe that Northern Pipeline indicated unconstitutionality of 28 U.S.C. 636(c).

With the exception of the six judges on the Ninth Circuit Court of Appeals, only one of the fourteen court of appeals judges who have had the question of constitutionality of 28 U.S.C. 636(c) presented to them has found it

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[5] Northern Pipeline Construction Company v. Marathon Pipeline Company, 458 U.S. 50 (1982).

unconstitutional[6]. The foregoing does not take into account the thousands of cases based on magistrates' judgments pursuant to §636(c) in which no question of constitutionality of the Magistrates Act

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[6] In Central Soya Company, Inc. v. Voktas, Inc., 661 F.2d 78 (7th Cir. 1981), Judge Pell dissented from the majority per curiam decision which held that an appeal under 28 U.S.C. §1292(b) could be certified by a magistrate for hearing before an appellate court panel. Judge Pell based his decision on the language of §1292(b) which specifically states that a "district judge" may certify a matter under §1292(b). Judge Pell's objection appeared to be based primarily on the fact that §1292(b) "specifically and expressly empowers 'a district judge' not a district court to take steps under it." 661 F.2d at 82.

was raised on appeal[7].

2. The Powers Delegated To A Magistrate By The Judges Of The District Courts Pursuant To 28 U.S.C. 636(c) Are Within The Permissible Limits Established By The Constitution.

A magistrate is not, as Petitioner contends, vested with full judicial powers to act as a substitute for an Article III district court judge by the Act. If all parties give voluntary consent to trial before a magistrate, an Article III judge may then assign the case to a magistrate,

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[7] Rickards v. Canine Eye Registration Foundation, Inc., 704 F.2d 1449 (9th Cir.) cert. denied, ____ U.S. ____, 104 S. Ct. 488, 78 L.Ed.2d 683, decided May 3, 1983 which was after argument but prior to the decision by the original three judge panel in the present case. No question of constitutionality of 636(c) was raised even though Judge Boochever sat on the panel in Rickards and was the author of the original three judge opinion in the present case.

but the Article III judge maintains ultimate control over the case and may vacate the reference at any time, 28 U.S.C. 636(c)(6). Thus there are limitations and controls imposed on the judicial power which may be exercised by a magistrate.

This is to be contrasted with the 1978 Bankruptcy Reform Act (BRA), held unconstitutional in Northern Pipeline. The BRA set up a whole new Bankruptcy Court with judges who were completely separate from the district court. Cases were filed originally in the Bankruptcy Court which independently from the district court entered final judgment. Parties were virtually powerless to remove a matter from the Bankruptcy Court. Non-Article III judges were to exercise powers beyond those granted to Article III judges such as jurisdiction over traditional state

court matters. There was no provision for consent of the parties.

3. Exercise Of Limited Judicial Power By Magistrates Does Not Threaten Institutional Values Which Are Guaranteed Constitutional Protection.

Petitioner suggests that only a life-tenured, irreducible salaried Article III judge may exercise the judicial power of the United States[8]. Petitioner in this instance confuses the court with the individuals who carry out the duties and responsibilities of the court. Article III courts, in order to maintain independence from political forces must have Article III judges who enjoy life-tenure and irreducible compensation. This does not, however, constitutionally preclude delegation of certain duties of an

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[8] Petition page 10.

Article III court to individuals who are not Article III judges.

This Court has repeatedly affirmed the validity of rules and procedures that permit magistrates[9] and other court officials[10] to perform functions traditionally performed by Article III courts. These officials must perform decision

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[9] U.S. v. Raddatz, 447 U.S. 667 (1980); Matthews v. Weber, 423 U.S. 261 (1976); Fed. R. Civ. Pro. 73(a).

[10] Heckers v. Fowler, 69 U.S. (2 Wall.) 123 (1865) (Dispute determined by referee with consent of the parties and entry of judgment by court clerk upheld); Kimberly v. Arms, 129 U.S. 512 (1889) (Special master appointed with consent of the parties to decide all issues in the case. Findings to be reviewed only for manifest error). See also Steger v. Orth, 258 F. 619, 621 (7th Cir.), cert. denied, 250 U.S. 663 (1919). (Case referred to a referee with written consent of the parties. Procedure upheld as one which was appropriate, proper and one which did not deprive a defeated party of his right to review in an appellate court). Federal Rule of Civil Procedure 55(b)(1) empowers district court clerks to enter final judgment in default cases.

making functions to be effective. Actual decision making, therefore, cannot be the distinguishing hallmark of judicial power. Otherwise, allowing non-Article III judges to carry out such functions as hearing witnesses and evaluating their credibility would not be constitutional. As this Court observed in 1932, there is "no requirement that, in order to maintain the essential attributes of judicial power, all determinations of fact in constitutional courts shall be made by judges." Crowell v. Benson, 285 U.S. 22, 51 (1932). This Court in Crowell also observed that Article III serves primarily to circumscribe the judicial power of the United States in terms of subject matter jurisdiction rather than dictate the mode or forms of practice in federal court[11]. As a practical matter,

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[11] 285 U.S. at 53.

a court official cannot be a fact finder without making certain legal decisions regarding evidentiary and procedural issues.

Thus, it is the constitutionally granted power to decide disputes and not the mechanics of decision making which falls within the "essential attributes of judicial power" that the Northern Pipeline plurality said must remain the province of federal district courts[12]. Because it does not deprive district court judges of that right, as did the BRA, the Magistrates Act does not represent an "encroachment or aggrandizement"[13] by Congress at the expense of the judicial branch. Neither does the Act draw into question the separation of powers concern underlying the plurality's opinion in Northern Pipeline.

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[12] 458 U.S. at 87.

[13] Id. at 83.

Petitioner contends that because "there is no statutory guidance as to when and how such [judicial] control should be exercised to ensure that withdrawals of references will be made when appropriate"[14] the Magistrates Act is fatally flawed. Petitioner then suggests that such control would be adequate if the district court judges had the ultimate power to enter judgment following "fact finding" by the magistrate as provided by 28 U.S.C. §636(b). If, as Petitioner contends[15] all judicial functions must be performed by an Article III judge, a logical corollary is that no judicial function, including fact finding, could be performed by a non-Article III judge. This Court has never held that all judicial

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[14] Petition page 14-15.

[15] Petition page 10.

functions must be performed by an Article III judge and, in the cases previously cited[16], has upheld the authority of non-Article III judicial officials to perform certain judicial functions in federal courts. Limited exercise of judicial power, as performed by a magistrate acting with the consent of the parties in an Article III court, does not affect the institutional values which are protected by Article III.

4. Litigant Consent Under 28 U.S.C. 636(c) Is The Keystone For Providing Constitutional Authority For A Magistrate To Enter A Final Decision In A Patent Case.

The law is well-established that parties may not consent to subject matter jurisdiction. If it does not already exist in the court, the parties may not, through

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16 Supra, footnotes 9 and 10.

stipulation or express consent, vest the court with subject matter jurisdiction[17]. Subject matter jurisdiction to decide patent infringement cases is vested in Article III courts by 28 U.S.C. 1338(a).

Prior to enactment of the 1978 BRA, bankruptcy referees could exercise jurisdiction over cases which they would otherwise be unable to hear **only with the consent of the parties.**

> Before the act, the referee had no jurisdiction, except with consent, over controversies beyond those involving property in the actual or constructive possession of the Court. 11 U.S.C. §46(b). . . Repealed. See McDonald v. Plymouth Trust Company, 286 U.S. 263, 266 (1932)[18].

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[17] Mansfield, Coldwater and Lake Michigan Ry. Co. v. Swan, 111 U.S. 379 (1884); Minnesota v. Hitchcock, 185 U.S. 373 (1902); Mitchell v. Maurer, 293 U.S. 237 (1934); California v. LaRue, 409 U.S. 109 (1972), reh'g denied, 410 U.S. 948 (1973).

[18] Northern Pipeline, 458 U.S. at 79, n. 31.

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This Court has intimated, although it has never decided, that the referee may, if the parties consent, try the issues which must otherwise be tried in a plenary suit brought by the trustee. (citing cases) And we can perceive no reason why the privilege of claiming the benefits of the procedures in a plenary suit, secured to suitors under §60(b) and §23(b), may not be waived by consent, as any other procedural privilege of the suitor may be waived, and a more summary procedure substituted. (citing cases) 286 U.S. at 267.

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While under the provisions of the Bankruptcy Act the exercise of his jurisdiction by the referee is ordinarily restricted to those matters which may be dealt with summarily by the method of procedure available to referees in bankruptcy, the restriction may be removed, as it was here, by the consent of the parties to a summary trial of the issues presented. The referee therefore had power to decide the issues, and the Court of Appeals below should have considered the appeal on its merits. 286 U.S. at 268.

The issue in McDonald was whether the referee, following consent of the parties, had the authority to decide issues which would normally be determined in a plenary suit. The Court of Appeals for the First Circuit held that a plenary suit was necessary and that the referee was without jurisdiction to decide the issues. This Court held that because under the 1903 Bankruptcy Act the district court had subject matter jurisdiction to hear and determine the suit, a referee, appointed by the district court with consent of the parties, had the authority to hear, decide and enter judgment in the case. The instant suit presents a similar situation.

The conferring of authority on bankruptcy referees under the pre-1978 Bankruptcy Laws having been sanctioned by this Court in McDonald, it follows that

consent to trial before a court official sitting in an Article III court has been held constitutionally permissible -- for at least fifty years. The Constitution requires that the judicial official be exercising subject matter jurisdiction in an Article III court and that the litigants before the judicial official consent to trial before the official.

Patent suits, like bankruptcy cases, are under the exclusive jurisdiction of the federal courts. Nothing in the Magistrates Act has caused subject matter jurisdiction to be vested in a court which is constitutionally not authorized to hear the dispute.

The separation of powers established by the Constitution provides for an independent judiciary which is not subject to the influences of the executive and legislative branches. This

consideration is not diminished by the use of consensual reference of civil cases to magistrates because the guaranteed exercise of judicial power by an Article III court with proper subject matter jurisdiction continues. However, the right to trial by an Article III judge is a due process right which is specific to the particular litigants in a given case which, and, being a due process right, is one which they are free to waive. Consent to trial before a magistrate then, is nothing more than the waiver of a due process right to trial before an Article III judge. If any party to the litigation does not consent to trial before a magistrate, an Article III judge will occupy the bench during the litigation, 28 U.S.C. §636(c)(2).

> The safeguards accorded Article III judges were designed to protect the

> litigants with unpopular or minority causes or litigants who belong to despised or suspect classes. Palmore v. United States, 411 U.S. 389, 412 (1973 Douglas, J., dissenting).

The constitutional rights protected by Article III are therefore due process rights of the litigants, rights that are subject to waiver, and are not intended to provide judicial job

security[19]. Just as a party may waive these basic constitutional rights, so may parties waive their constitutional rights to an adjudication by an Article III judge.

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[19] This Court has explicitly approved the waiver of basic constitutional rights by parties including the waiver of rights that would preclude adjudication by an Article III judge. The right to plead guilty to criminal charges precludes adjudication of the matter by an Article III judge, and has been upheld by this Court. Boykin v. Alabama, 395 U.S. 238, 243 (1969); waiver of the right against self-incrimination, Garner v. U.S., 424 U.S. 648 (1976); a criminal defendant may waive the right to a jury trial, Duncan v. Louisiana, 391 U.S. 145, 159 (1968), and parties to civil litigation must specifically request a jury trial, Fed. R. Civ. Pro. 38(b) and (d); criminal defendants may waive the right to counsel, Adams v. U.S., 317 U.S. 269 (1942), Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938); criminal defendants may waive the right to a speedy trial, Barker v. Wingo, 407 U.S. 514, 530 (1972); and criminal defendants may waive the Fourth Amendment right against unreasonable searches, Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

CONCLUSION

For the reasons set forth above, the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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